No. 89-1150

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Supreme Court of the United States

OCTOBER TERM, 1990

BLUE CROSS AND BLUE SHIELD
OF MARYLAND, INC.,

Petitioner,

v.

ROBERT WEINER, SR., MARGARET WEINER, MARK WEINER,
AND ROBERT WEINER, SR. AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF STEVEN WEINER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
FOURTH DISTRICT COURT OF APPEALS OF FLORIDA

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEALS OF FLORIDA

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ARGUMENT

Petitioner Blue Cross and Blue Shield of Maryland, Inc. ("BCBSM") submits this Reply in Support of its Petition for a Writ of Certiorari.

The Florida State Intermediate Appellate Court determined that, where an employer purchased insurance through a trade association group insurance plan, with eligibility limited to employees of the member businesses, no ERISA plan existed, merely because the employer was a

small family business and the covered employees were also members of the employer's family. The Florida State Court's decision would deny ERISA's protections to many thousands of employees in small, family businesses. Moreover, by exposing employers and their insurers to the ruinous punitive damage awards which can result from state court tort litigation, it will discourage the provision of insurance to employees which ERISA was designed to promote.

The decision thwarts the mandate of Congress. It ignores this Court's decisions recognizing the unique federal interest in ERISA, exemplified by exclusive federal jurisdiction over the ERISA claims at issue here, and ERISA's complete preemption of state statutory and common law policies.

Respondents state that neither Plan was an ERISA Plan. The argument that the Weiners' "Station Plan" is not an ERISA plan is flawed by the inherent contradiction in Respondents' "Brief in Opposition" to the Petition. Thus, Respondents argue that Robert Weiner, Sr. desired only to obtain coverage for his family, and that he never provided insurance for employees who were not family members. This, they state, is dispositive in determining that the Station Plan was not an ERISA plan (Brief in Opposition at 8-9). They ignore the fact that there *were no other employees* (other than Mr. Weiner and a son). They dismiss Mr. Weiner's testimony characterizing the other employees at the station as simply "independent contractors" as "not the test." (Brief in Opposition at 17n5.) Thus, Mr. Weiner's views are either critical, or irrevelant, in accordance with Respondents' convenience.

Respondents cite several cases as support for the fiction that no ERISA plan was established because Mr. Weiner simply desired to purchase insurance for his family (Brief in Opposition at 12-13). None of these cases support that proposition.

The initial holding in *Taggart Corp. v. Life Health Benefits Administration,* 617 F.2d 1208 (5th Cir. 1980), *cert. denied,* 450 U.S. 1030 (1981), that a multiple employer trust ("MET") is not an ERISA plan, is inapposite, because the employer association plan involved in the present case is *not* a MET. The second *Taggart* ruling — that the employer, by subscribing to a MET, had not established an individual employee welfare plan covered under ERISA — has been rejected in subsequent decisions, and was reversed by Congress when it amended ERISA in 1982 (*see* BCBSM's Petition at 16-18). Each of the other three cases cited by Respondents, *Ed Miniat, Inc. v. Globe Life Insurance Group, Inc.,* 805 F.2d 732 (7th Cir. 1986); *Donovan v. Dillingham,* 688 F.2d 1367 (11th Cir. 1982); and *Davis v. Time Insurance Co.,* 698 F.Supp. 1317 (SD.Miss. 1988) found that the plans in question were covered by ERISA because the employer (like Respondent Robert Weiner, Sr.) purchased insurance to cover employees and their dependents.

Since Mr. Weiner's Station Plan was an ERISA plan, this litigation was governed by ERISA.

In support of their view that the "Association Plan" was not an ERISA plan, Respondents contend that the broker and administrator for the plan, Association Financial Services, Inc. ("AFSI") was providing benefits only for its *own* employees, and benefits were not provided for members of the Allied Gasoline Retailers Association of Florida ("AGRA"), the Florida affiliate of the Service Station Dealers of America ("SSDA"). (Brief in Opposition at 7-8.) In fact, it is undisputed that AGRA endorsed the Group Plan and its representatives enrolled participating employers (AGRA members) and their employees. Nevertheless, Respondents insist that AFSI, not AGRA, "established or maintained" the Plan.

The foundation for this argument is Respondents' contention that "AFSI's President confirmed in trial testimony that AFSI was not in any way acting on behalf of AGRA."

(Brief in Opposition at 8; *See id.* at 16.) The carefully excised testimony cited fails to disclose that the question to which AFSI's President responded related to AFSI's preliminary efforts to persuade AGRA to endorse the Plan, a prerequisite for AGRA members to obtain coverage under the Plan. Obviously, AFSI could not have been acting on *behalf* of AGRA at the same time it was seeking AGRA's endorsement. After it received the endorsement, it became broker of record for AGRA. The testimony which surrounds the quotation cited by Respondents (*see* Brief in Opposition at 8) places the quotation in its proper context:

> Q. *When you were presenting this program to Florida [AGRA]*, was Florida consider[ing] other programs at the same time?
>
> A. Yes.
>
> . . . .
>
> Q. Well it probably follows from the question I asked about the fact that *you were in competitions [sic] with others for this business*, you were not, as far as this business was concerned, acting in any capacity as agent for this state organization [AGRA], the Florida state organization; were you?
>
> A. No.

(R. 1985-87) (emphasis added).

Relying on this legerdemain, Respondents argue next that AFSI was only providing benefits for its own employees under the Association Plan (Brief in Opposition at 7-8). This argument fails, since the foundation upon which it rests is false. Once AGRA endorsed the Plan, AFSI acted as broker and administrator of the Plan. The Plan was not formed for the purpose of or with the effect of covering AFSI employees. Indeed, Mr. Weiner himself was covered by and sued for cov-

erage under the Plan (as well as under the Station Plan); he, of course, was not an AFSI employee. While the Plan "benefits book" did not mention AGRA by name (Respondents' Brief at 7-8), this argument too is misleading: it did refer to the individual local associations of the Service Station Dealers Association of America, of which AGRA was one. (*See* exhibits cited in Brief in Opposition at 8.)

Finally, Respondents cite three cases as purported examples of employer association-sponsored plans which were found to be outside of ERISA's coverage. (Brief in Opposition at 14.) However, *Plotkin v. Association of Eye Care Centers, Inc.*, 710 F.Supp. 156 (E.D.N.C. 1989) and *Insurance & Prepaid Benefits Trust v. Marshall*, 90 F.R.D. 703 (C.D. Cal. 1981), hold simply that a MET is not an ERISA welfare benefit plan. In *Baucom v. Pilot Life Insurance Co.*, 674 F.Supp. 1175 (M.D.N.C. 1987), the Court held that a retirement plan established by a state professional golf association was not an ERISA plan because the association was not an "employee organization." There, unlike in the present case, the defendant did not even argue that the plan was subject to ERISA on the ground that it was established or maintained by an association of employers.

CONCLUSION

This Court recognized in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) that:

> "[T]he federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

A writ of *certiorari* should issue in order to prevent precisely that result.

Respectfully submitted,

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